TOWARDS LAND RESTITUTION THROUGH AN AFRICAN PERSPECTIVE ON JUSTICE: A CRITICAL ANALYSIS OF LAND REFORM AND THE ROLE OF RE-IMAGINATION

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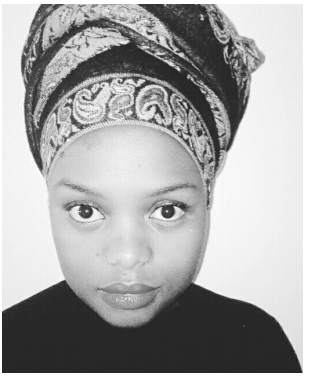

1 Introduction

The issue of land reform lies at the heart of African pride and dignity. However, colonisation leads to the systematic deprivation of land among the conquered people, as Ramose calls them. Ramose states that colonisation and racism were a dehumanising product of an unjust system, land deprivation being a sub-product of that system.[1] Ramose calls it a double injustice in an unjust war. A system of injustice where the conquered was denied the basic courtesy of humanity by the conqueror. Apartheid and colonisation were the draconian systems that denied an entire people the ability to be regarded as an equal. However, the most tragic legacy left by apartheid and colonisation is the denying of conquered people their unique way of life and culture which is intertwined and dependant on land.

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1 MB Ramose 'An African perspective on justice and race' (2001) 3 *Polylog Forum for Intercultural Philosophy.*

The question of economic sustainability within the aims of land reform is a grave concern for many persons and for many different reasons, especially given the failed example of Zimbabwe. Zimbabwe implemented a land reform program that disabled the economy and left the stench of poverty permeated in the air. However, the matter of Zimbabwe is not as elementary as it is often diagnosed to be.

The idea of delaying the restoration of the dignity and honour of a marginalised and excluded people, so as not to potentially aggravate the economy and duplicate the example of Zimbabwe, is problematic.

The view of potential economic threat extends on the idea of perceived European cultural superiority, not opening one's mind to what actually qualifies as property outside a European context.[2] It is further a narrow and warped view of human nature, failing to account for the differences in human society and human existence. Differences that extend beyond European cultural contexts.[3] European cultural context often dictates a monistic view of what entails a good life.[4]

In this article, I will not be delving into the debate of Zimbabwe and in turn the debate of land and economics. This will consequently serve as a limitation in the subject at hand.

The focus of this article is ascertaining what an African perspective to justice is and why it is needed as the primary premise in resolving land reform matters. Most importantly I will be looking at case law to assess whether South African courts are starting to turn to an African perspective to justice when dealing specifically with land wars in post-apartheid South Africa. I will also emphasise the need for our judicial system to re-imagine land and reform outside from what it is ordinarily understood to be in European norms.

2 Defining an African perspective to justice

Ramose's approach to justice stems from an African perspective. The perspective dictates that *molato ga obole*.[5] Furthermore, it relies heavily on Ubuntu.[6] The idea of Ubuntu embodies a flexible, unformalised and reasonable structure that links to morality. The

2 S Sibanda 'Not quite a rejoinder: some thoughts and reflections on Michel Man's "Liberal constitutionalism, property rights and the assault on poverty"' (2013) *Stellenbosch Law Review* 3.
3 Sibanda (n 2) para 1.
4 Sibanda (n 2) para 2.
5 '*Molato ga o bole*;a Sotho term that can be translated to: Justice has no prescription'. Ramose (n 1) para 7.
6 Ramose (n 1) para 5.

term Ubuntu triggers the idea of truth and justice where 'justice assigns responsibility'.[7]

I share the same sentiments expressed by Ramose regarding what defines an African perspective to justice.

Land reform is a feature of Ubuntu; aiming to assign responsibility through truth and reconciliation; through an African perspective. Thus it goes without question that land redistribution programs ought to be approached with an African perspective to justice, prescription and property. Consequently employing what is commonly known as, 'an African solution to an African problem'.

In the transition to democracy in South Africa, the democratisation paradigm was consistent with the conqueror's claims.[8] This is evident in the major weakness illustrated by the property clause in the 1996 Constitution. The 1996 Constitution failed in its nature and form to include the indigenous conquered people.[9] In its aims to conquer apartheid, it failed to address the land question in an in-depth and thorough manner. The democratisation paradigm lost sight of the fact that land to African peoples was and remains a basic issue. When aiming to address the idea of property, including land wars, the Constitution failed to address the issue from an African perspective to justice. Section 25(7) briefly articulates in four lines a vague solution to over 100 years of land deprivation.[10] Of course subject to section 36(1) of the Constitution, the limitation clause.[11]

It is crucial to note that the issue of land among African peoples has long been an issue before colonisation and apartheid. Land among African people is the thread that ties the very being of the African peoples together.

Land is sanctity, it is dignity, it is culture, and it is heritage and belonging. Thus land restitution and reparation, through an African perspective to justice, arise as necessities of historical justice in a post conquest South Africa.[12]

The omission of justice in reconciliation has sprouted much resistance. In the *AZAPO* case Justice Mohammed stated in his judgment that 'Much of the unjust consequence of the past could never be fully reversed. It might be necessary in crucial areas to close the book'.[13]

7 MB Ramose 'Reconciliation and reconfilliation in South Africa' (2012) 5 *Journal on African Philosophy* 21.
8 Ramose (n 1) para 15.
9 Ramose (n 1) para 15.
10 The Constitution of the Republic of South Africa 1996.
11 Constitution (n 10) Section 6(1).
12 Ramose (n 1) para 27.
13 *The Azanian Peoples Orginisation v the President of the Republic of South Africa* (CCT 17/96).

The above statement by Justice Mohammed hints at the complacency post-apartheid South Africa has in dealing with heartfelt issues inherited from apartheid, *in casu*, land deprivation. The statement by Justice Mohammed stems from the false premise that the 1996 Constitution of the Republic of South Africa was the meeting ground of compromise and reconciliation of all parties. The negotiations that brought about the Constitution of the Republic of South Africa, Act 108 of 1996, was an undemocratic process of elitists.[14] Within these negotiations, De Klerk consulted Whites as a group yet the ANC did not extend the honour of such consultation to the Blacks, and the issue of land was underestimated and side-lined.[15] Thus land reform aims to address the lack of Black representation and perspective that is not afforded by the Constitution. The increasingly louder call for land, especially among the conquered people, is a call that was recognised by the Freedom Charter and denied by the Constitution.

The issue of nationalising land has long been swept under the carpet. Mandela in a 1956 publication, *Liberation*, expressly addresses the mining, banking and industry monopoly, but somehow is never found addressing land. Thirty years after Mandela's publication, at the 60th anniversary of the South African Communist Party, Tambo speaks of the need for 'economic emancipation' but somehow also fails to address the very urgent and grave issue of land.[16] This is an enigma of South African history.

The greatest hindrance to true reconciliation among South Africans is the absence of justice. Many South Africans lead landless and unvindicated lives. These are issues that need to be addressed with the urgency they deserve. Perhaps '[i]t is easy for Mandela and Tutu to forgive … they lead vindicated lives'.[17] In many South African's lives, nothing has changed with the transition to democracy. The majority remains marginalised, poor and landless.

3 *The Occupiers v Steele*[18]

The Supreme Court of Appeal case of *The Occupiers* is an exceedingly important case in the sphere of space and land issues.

Briefly stating the facts; the appellants are a group occupying a property situated at 11 Hendon Road, Yeoville in central Johannesburg.[19] The appellants have defaulted on their rental

14 Ramose (n 7) 26.
15 Ramose (n 7) 26.
16 Ramose (n 7) 27-28.
17 A Krog *Country of my skull: Guilt sorrow and the limits* (1999) 109.
18 *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* (102/09 and 499/09) [2010] ZASCA 28.
19 *The Occupiers* (n 18) para 1.

payments that were due to the respondent, and the owner of the property, Mr Steele. In the court of first instance the appellants received an eviction order against them and when they applied for a recession of the order, it was refused. The court *a quo*, consequently, granted the appellants leave to appeal to the Supreme Court of Appeal. The appellants and the respondent further stated that 'if the recession appeal was successful it would be determinative of the entire matter'.[20]

After an unsuccessful search for alternative and affordable accommodation by the applicants, the due date for the vacation of the premises found the appellants still occupying the property.

When approaching the court the applicants primarily relied on the common law of 'good cause' and Uniform rule 42(1). Generally the requirement of 'good cause' is understood as a *bona fide* defence which, *prima facie*, shows prospect of success.[21]

One of the occupiers, Mr Ngcobo, set out in the affidavit, his and the remaining appellants personal circumstances. Approximately 70 people reside on the property. The property comprised of four large flats that were subdivided into multiple units, as well as an additional three separate rooms, formally staff quarters.[22] The tenancy ran for a periodic monthly basis where the rental per flat amounted to R1 239 and R 266 per room. According to the respondent the property had become overcrowded and dilapidated to the extent that he decided to renovate it. Consequently terminating all the leases, with three months' notice.

Included among the residents of the property are persons with disabilities, women headed households and children. Mr Ngcobo himself has been residing on the property, namely the single room, since 1992 with his two wives and children. Ngcobo further illustrated the poor living conditions of the occupiers and their informal stalls where they sell sweets and cigarettes that serve as their primary income.[23] All in all the occupiers of the property are poverty stricken and from previously disadvantaged groups. Eviction would inevitably result in homelessness.

Section 4(6) and 4(7) of the PIE Act reads as follows:[24]

> 4(6) If an unlawful occupier has occupied the land in question for less than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances,

20 As above.
21 *The Occupiers* (n 18) para 4.
22 *The Occupiers* (n 18) para 2.
23 *The Occupiers* (n 18) para 5.
24 Prevention of Illegal Eviction from Unlawful Occupation of Land Act 19 of 1998 (hereafter PIE).

> including the rights and needs of the elderly, children, disabled persons and households headed by women.
>
> (7) If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.

Important terms worth noting from the above legislation are the introduction of justice and equitability in the dealing of land issues. These are values added into the Act in order to facilitate a change in property rights and land issues in South Africa.

The change to a more value-laden approach to land, as opposed to a monistic approach, is in line with Constitutional values, and the idea of approaching land issues with the value-laden African perspective to justice.[25]

Evidently, the courts in themselves have moved towards a cause of re-imagining what property and land mean to marginalised and previously disadvantaged persons such as *The Occupiers* in Yeoville. The reiterated emphasis of the sentiment of a value-laden approach to land occupation is in line with the African perspective to justice. The ideas of justice and equity are ideas of Ubuntu. Justice and equity are an elaboration of acknowledgement. As Justice Sachs reiterated in *Port Elizabeth v Various Occupiers*, there's an obligation to 'have regard to the circumstances'. Knowledge and acknowledgement are key components of an African perspective to Justice and Ubuntu.[26]

It was thus concluded by the court of appeal that it would not be just and equitable for a court to grant an eviction that would render the occupiers of the property homeless. The court of appeal's decision is a fascinating stance to note especially because it affects the most comprehensive real right to property which is ownership, ownership which cannot be limited arbitrarily.[27] Perhaps the shift to a more African perspective to justice shows an act of recognition from the legislature and judiciary of the legacy of land deprivation in South Africa.

Undoubtedly the requirements of justice, equity and good cause are values that take on the responsibility of re-imagining land disputes

25 *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 11.
26 A Sachs *The strange alchemy of life and law* (2011) 79.
27 Constitution (n 10) Section 25(1).

through an African perspective to justice which embodies Ubuntu; and which extends to recognition, dignity, humanity, and honour.

The idea of justice and equitability was also extended to the Extension of Security of Tenure Act as applied in the *Molusi* case.[28]

4 Prevention of Illegal Eviction from Unlawful Occupation of Land Act: the introduction of re-imagining an African perceptive on justice[29]

The case of *The Occupiers* becomes an important source of precedent for matters of land.[30] The PIE Act's introduction of 'justice and equality' are qualities of Ubuntu. It's an Act that recognises South Africa's sore past and the legacy of segregation Acts such as The Group Areas Act of 1950 which left many groups of people marginalised, and landless.

The Occupiers' judgment is important because it realises that land issues in South Africa cannot be treated in isolation to our draconian apartheid history. This is undoubtedly a type of recognition that should be carried through to all programs and spaces that address land disputes in South Africa.

5 The role of re-imagining when addressing issues of land

At face value, it appears as if the approach of resolving land disputes outside of European construct is beginning to take place in legislation such as the PIE Act and judgements such as *The Occupiers*.[31] However, as applaudable as it is, formal land reform programs still fail to see the need to address land issues through a value-laden African perspective to Justice. We have to come to a point of re-imagining what property means in an African setting among African people. Perhaps with that constant re-imagination, we will be able to produce solutions to land disputes that aren't divorced from the needs of the people.

Parekh embarks on a critical exploration between colonialism and liberalism. He does so through a specific focus on Locke's writings. Parekh profoundly states that:

28 *Molusi and Others v Voges N.O. and Others* [2016] ZACC 6.
29 PIE Act (n 24).
30 *The Occupiers* (n 18).
31 *The Occupiers* (n 18).

> The contradiction is not just between liberal thought and liberal practice, but within liberal thought itself. Liberalism is both egalitarian and inegalitarian, it stresses the unity of mankind and the hierarchy of cultures, it is both tolerant and intolerant, peaceful and violent, pragmatic and dogmatic, sceptical and self-righteous.[32]

Parekh concludes through Locke's writings that an egalitarian premise does not necessarily translate into an egalitarian conclusion or outcome.[33] Much like the Constitution's European approach to property and land reform; its premise is a noble egalitarian perspective. However, it does not translate into an egalitarian-oriented outcome.

Sibanda supports Biko's call for the decolonisation of the mind and he also brings in the important idea of re-imagining our understanding and approach to land disputes. The critique of section 25 extends to the colonial structure and idea of property that it embodies. The premise of the critique is based on critiquing in order to probe a new set of ideas. It is about re-imagining the future and not centralised around White guilt. We learn from the past, as well as present ideas, to reinvent and re-imagine the future.

A part of re-imagining is evaluating history. Evaluating history's patterns and asking the hard question as to why history keeps repeating itself. This extends to a critical understanding of history. In our process of re-imagination, we need to understand the why and how. Why the call for land reform and how will it be implemented. In our process of re-imagining the future and decolonising the mind, we need a clear theoretical and philosophical premise on the why and how or else the idea will collapse.

If the present ideological function of land reform is wanting, which it is, it should be re-imagined with an African perspective to justice and changed accordingly. Sibanda emphasises the pertinent role of re-imagining ideals and consequently forming foundations on the re-imagined future.

Ideas should be able to serve 'we the people'.[34] Ideas around land should be translatable into political and lived philosophy of the people as Constitutional values are neither self-evident nor eternal.[35] However, liberalism within this hegemonic liberal constitutionalism has dwarfed and disabled our imagination, in what it means to be African people in African spaces.[36]

The strength of democratic values lie in their ability to adapt and remain relevant and sensitive to the local histories and realities. [37]

32 Sibanda (n 2) 336.
33 Sibanda (n 2) 337.
34 Constitution (n 10) preamble.
35 Ramose (n 7) 15.
36 Sibanda (n 2) 340.

The call for the decolonisation of the imagination will answer the questions we have about land and economics. The idea of a democratic South Africa was in itself once an idea of a re-imagined world different from what was then understood and known. Thus what we know should not hinder the call for the re-imagination and creation of a new form of consciousness. What we know should not hinder a new way of life and approach to land and justice, an approach different from what we presently understand.[38]

6 Constitutional review of section 25

The year 2018 has seen the consequent action from the call for the constitutional amendment of section 25; the property clause, of the Constitution of the Republic of South Africa. It is a glorious scene to behold a democracy in action; a democracy and constitution that allows itself to adapt to the present convictions of the people.

Given the sanctity in which the South African Constitution is viewed, many people fear the idea of any sort of amendment and tampering with South Africa's sacred cow. However, in an effort to extinguish those fears, it is worth making it known that the Constitution as it presently stands has been amended 17 times, throughout the years. Thus, we should not fear constitutional review and active citizen participation in the redefining of principles and values for South Africa, as per the convictions of 'we the people'.[39]

Chapter 2 of the Constitution (applicable to section 25) may only be amended by means prescribed by in section 74(2).[40] The Constitution is *lex fundamentalis*, therefore, the process prescribed for its amendment is more onerous than ordinary legislation thus, compelling extensive public participation.

In one of the public hearings, the academics that spoke out expressed their view to the Constitutional Review Committee (CRC) that it is in fact not necessary to amend section 25 as a means of effecting land reform.[41] Booi of the University of Cape Town's Land and Accountability Research Centre argues that the Constitution already permits non-compensated expropriation.[42]

If the interpretation of Booi is correct, then the question asked by Hall of the University of the Western Cape's Institute for Poverty, Land

37 Sibanda (n 2) 340.
38 Sibanda (n 2) 341.
39 Constitution (n 10) preamble.
40 Constitution (n 10) Section 74 (2).
41 J Gerber 'No need to amend Constitution, academics tell constitutional review committee' https://www.news24.com/SouthAfrica/News/no-need-to-amend-constitution-academics-tell-constitutional-review-committee-20180904 (accessed 10 October 2018).
42 As Above.

and Agrarian Studies is well founded. Hall argues that the government is asking the wrong question. She further elaborates that the question government ought to ask itself is why hasn't section 25 been exploited to the benefit of the people in line with land reform?

Hall's question provokes introspection on the cause of land reform failure in South Africa. Is it due to the lack of constructive action that's disabled its effective implementation or the inherently impaired construct of section 25? Perhaps the former president Motlanthe chaired high level panel report recommendations answer the question raised by Hall. The high level panel report acknowledges that land reform 'lacks a vision for inclusive agrarian reform', resulting in many *lacunas*, consequently, the panel made recommendations for legislative clarity, restructure and review around the issue of land redistribution.[43]

Professor Bradley Slade from the University of Stellenbosch's law faculty is of the stance that the amendment of section 25, would result in the complete overhaul of the constitutional design.[44] If the implementation problem of section 25, is orientated around the ambiguity on the issue of expropriation without compensation, then perhaps the discussions around the amendment of the property clause should aim to clarify that conundrum.

On the contra, Dr Rick de Satgé of Phuhlisani; a non-profit organisation, is recorded saying that: 'Land remains a potent metaphor for dispossession — a signifier that South Africa does not yet belong to all who live in it.'[45]

To reiterate Sibanda's sentiments, the amendment of section 25 is a hope for many South Africans living in the congested stink and squalor of poverty, that the Constitution will finally problematise the issue of landlessness among the conquered. However, in the effort of thoroughly dealing with one problem at a time, *in casu*, exclusively with land reform, the possible amendment of the property clause must aim to distinguished land rights from other rights. The amendment must take into careful consideration the fact that 'property is not limited to land'.[46]

43 High level panel on the assessment of key legislation and the acceleration of fundamental change' https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf (accessed 10 October 2018) 81.
44 Gerber (n 41).
45 Gerber (n 41).
46 Constitution (n 10) Section 5 (4)(b).

7 Concluding thoughts and the way forward

South African history on property law is closely linked to the state's denial of land rights and the undermining of legal status and the citizenship rights of the conquered.[47] There are undoubtedly fundamental similarities in the *modus operandi* of past and present property laws that separate South Africa into two separate legal zones. South African property law and geography remain divided into Bantustans and the remaining 87 percent remains set aside for White ownership. An African perspective on justice is based on truth and justice. Where 'justice assigns responsibility'.[48]

Responsibility is taking knowledge into acknowledgement.[49] It actively aims to redress by taking an obligation to 'have a regard to the circumstances'. The circumstances around South Africa's dark past revolve around apartheid and colonisation that implemented the deprivation of land among the conquered peoples. Land among African peoples is inter-linked to their very identity. Land is dignity, heritage and belonging. Therefore restitution and reparation, through land reform, are necessities of historical justice in a post conquest South Africa.[50]

Our idea of wealth and property is European-orientated. It is narrow-minded to the sense that we fail to re-imagine, through Constitutional imaginary. We can no longer pretend that our present problems do not exist. South Africa's land and geographical planning remain colonial and contra to the ideals of transformative Constitutionalism. Thus here stems the urgency to re-imagine ideas that will be translatable into political and lived philosophy of the people. Although Michelman seems to believe that there is no need for a property clause, given the inherently protected rights as stated in the Bill of Rights, Sibanda disagrees. The main problem arising from section 25 is its lack of ability to problematise the current position of the conquered peoples in Africa, who still reside in Bantustans. Democratic values are not eternal, they require revision so they may remain relevant and translatable into lived change.

Franz Fanon speaks of a national conscience, a stature we must take on in order to redistribute without collapse and the cannibalising of self and society.

Re-imagining requires critical analyses of history and a clear theoretical and philosophical premise for the way forward with regard

47 A Claassens 'Law, land and custom, 1913-2014: What is at stake today?' *B Cousins and C Walker (eds)* (2015) 68-84.
48 Ramose (n 1) 21.
49 Sachs (n 26).
50 Ramose (n 1) para 27.

to land wars. Re-imagining requires that we look beyond what we know and instead build foundations formulated from our ideals.

We must never underestimate the power of re-imagining our approach to land and property in South Africa, through an African perspective. Present day Democratic South Africa is in itself an idea once imagined.